No.

In the Supreme Court of the United States

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, CARDINAL EDWARD M. EGAN, REVEREND MONSIGNOR THOMAS DRISCOLL AS EXECUTOR OF THE ESTATE OF BISHOP WALTER CURTIS, REVEREND MONSIGNOR ANDREW T. CUSACK, AND REVEREND MONSIGNOR LAURENCE BRONKIEWICZ,

Petitioners,

v.

THE NEW YORK TIMES COMPANY, THE HARTFORD COURANT COMPANY, GLOBE NEWSPAPER COMPANY, INC., THE WASHINGTON POST COMPANY, AND GEORGE L. ROSADO,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In civil suits challenging a church's determination that certain priests were suitable for ministry, petitioners (two Roman Catholic bishops, other clerical supervisors, and their Diocese) ("the Diocese") objected that any requirement that they produce internal personnel evaluations in discovery would violate the "internal affairs doctrine" that this Court has recognized under the First Amendment. Under protective orders that immediately sealed the material and prohibited any further dissemination or disclosure to third-parties, the Diocese produced the privileged material to plaintiffs' counsel. Years later, after the cases settled, several newspapers (respondents here) sought access to the sealed, privileged material. The Connecticut Supreme Court ruled that, by producing the confidential documents under the protective orders, the Diocese had "waived" the right to invoke the First Amendment privilege to prevent general public dissemination. The court also adopted a sweeping definition of the scope of "judicial documents" to which the public has a "presumptive right of access."

1. Under the test established by *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and its progeny, for "waiving" federal constitutional rights (that the party deliberately abandoned the constitutional right):

(a) Does a church waive otherwise valid First Amendment privileges by complying with a pre-trial protective order that seals confidential material and prohibits any disclosure to third-parties or the public, unless the church refuses to comply and goes into contempt?

(b) If *any* waiver of a constitutional privilege may be inferred under these circumstances, should this Court adopt the "selective waiver" concept and allow the party claiming the privilege to assert it against third-parties and the public?

2. Should the Court resolve the acknowledged conflict among federal and state appellate courts and determine:

(a) that the "presumptive right of public access" to "judicial documents" applies only to documents that are directly relevant to the public's evaluation of the courts' performance of substantive judicial functions, and

(b) that any presumption of public access must be balanced against the litigant's continuing interest in privacy?

RULE 14.1(b) STATEMENT

Petitioners are Bridgeport Roman Catholic Diocesan Corporation, Cardinal Edward M. Egan, Msgr. Thomas Driscoll (as Executor of the estate of Bishop Walter Curtis), Msgr. Andrew T. Cusack, and Msgr. Lawrence Bronkiewizc.

Respondents are the intervenors *New York Times* Company, *Hartford Courant* Company, *Washington Post* Company, and *Globe Newspaper* Company ("the Newspapers"), as well as George L. Rosado, the named plaintiff in the original case styled *Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation*, (Superior Court of Connecticut, Judicial District of Fairfield at Bridgeport).

Respondents also include the named plaintiffs in the twenty-two other cases subject to the protective and sealing orders (or their equivalent) at issue in this Petition, although they did not participate in the proceedings before the Connecticut Supreme Court. These respondents are: J. Fleetwood, Sharon See, Jamie Belleville, S.P. Carr, M. Didato, John Doe, Paul Doyle, Sandra Forsberg, J. Harding, J. Knecht, Alvin Koscelek, William Kramer, James Krug, Katherine Landro, M. McDonough, Theresa Pace, J.L. Powers, Jenilee Rosado, Richard Rosado, James See, Ronald Slossar, and William Slossar. A list of these cases may be found at App.100a n.1.[1] Non-petitioning co-defendants are Raymond Pcolka Charles Carr, Martin Federici, and Walter Coleman.

In addition, four priests denominated John Doe 1-4 intervened in this litigation for the purpose of protecting their privacy rights from being compro-

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[1] "App.__a" refers to the Diocese's Appendix to this Petition.

mised through the public disclosure of personnel files produced in discovery and filed under seal.

RULE 29.6 STATEMENT

The Bridgeport Roman Catholic Diocesan Corporation is a religious corporation established under Connecticut statutes. It has no securities owned by public shareholders.

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Petitioners, Bridgeport Roman Catholic Diocesan Corporation, Cardinal Edward M. Egan, Msgr. Thomas Driscoll (as Executor of the estate of Bishop Walter Curtis), Msgr. Andrew T. Cusack, and Msgr. Lawrence Bronkiewizc (collectively "the Diocese"), petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court (App.1a-99a), is reported at 292 Conn. 1 (2009) ("*Rosado II*"). The decision of the Connecticut Superior Court (Alander, J.) (App.100a-138a), is unreported. The previous decision and orders of the Connecticut Superior Court (Levin, J.) (App.139a-163a) are unreported.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 2, 2009. The court denied a timely motion for reconsideration and reconsideration en banc on June 30, 2009. Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review that court's decision.

STATEMENT

A. Three Judges Enter Protective Orders After the Diocese Raises First Amendment Objections to Pretrial Discovery.

Beginning in early 1993, amidst heavy media coverage, twenty-three lawsuits were filed against the Diocese and individual clergymen in Connecticut state courts alleging sexual abuse of minors. App.100a n.1. The cases sought to hold the Diocese

(including clerical superiors) liable under tort theories of *respondeat superior* and negligent supervision. The theory was that the Church's hierarchy, including two successive Bishops, had made misjudgments in evaluating the suitability of certain priests for ministerial assignments after they were accused of sexual abuse or after they returned from psychological or medical assessment or treatment.

In its Answers, the Diocese raised the First Amendment as an affirmative defense.[1]

In August 1994, plaintiffs noticed the depositions of two Bishops and demanded document production. Invoking the Free Exercise and Establishment Clauses, the Diocese moved for a protective order (i) barring forced disclosure of confidential information or documents (App.202a-204a) and (ii) restricting the use and dissemination of any discovery information obtained through the depositions of the two Bishops (App.200a-201a).

The Diocese objected that the First Amendment afforded the Diocese "the right to function as a religious institution without undue intrusion or entanglement from any branch of government, including our court system" and "calls for this Court to avoid excessive intrusion in the affairs of the Diocese as a

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[1] For example, the Diocese's June 30, 1994, Substituted Answer in *Rosado* stated:

> "The claims of negligent employment practices … call for this Court to examine and pass judgment on policies and practices of the Roman Catholic Church which are based to a great extent on the religious tenets and the religious disciplines of the Roman Catholic Church. The free exercise of religion clause of the First Amendment *** bars this Court from adjudicating those employment practices ***."

religious institution and to avoid any discovery order which may be unduly burdensome to the Diocese's ability to function as a religious institution" (App.203a).

The Diocese also argued that requiring production and dissemination to "non-parties" of confidential files relating to "the Diocese's personnel practices and policies relating to priests" would violate the "free exercise of religion clause of the First Amendment" by invading the "internal affairs of the Roman Catholic Church" (App.200a).

In December 1994, Superior Court Judge Levin required that the Diocese produce the requested information to plaintiff's counsel for their exclusive use in preparing for any potential trial (App.156a-163a). However, the judge granted the Diocese's request to "seal" the confidential information and issued a "protective order," directing that "all information, documents and transcripts which the parties may obtain through the depositions of the defendants," of Church officials, and of Bishop (now Cardinal) Egan, would be unavailable to the media.

These materials included confidential physical and health information and internal Diocesan memoranda reflecting the hierarchy's evaluations of fitness for continued ministry. The materials could

> "not be disseminated, shown, disclosed, divulged or transmitted by any one to any person or organization other than the parties *** and their respective attorneys ***." (App.162a-163a).

Judge Levin noted that "edification of the public is not a proper purpose of pretrial discovery" (App.158a-162a). He concluded that the need to pro-

tect the Diocese's right to a fair trial sufficed to warrant the protective order. He took judicial notice of the media's coverage of the cases, including the presence of media representatives at the hearing (App.161a).

The protective order included a process for reviewing the Diocese's First Amendment privilege claims at a later stage:

(1) The prohibition against disseminating the confidential discovery material to anyone other than counsel and the parties was to remain in effect indefinitely, "[u]ntil further order of the court, which order shall be made not later than the completion of jury selection."

(2) Even if the cases eventually went to trial, the Diocese would have the right to object to any proposal to use the sealed material publicly:

> "All such documents and transcripts * * * shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order."

(3) Any materials filed with the court in connection with any pretrial motions or proceedings had be filed under seal and marked conspicuously "CONFIDENTIAL: SUBJECT TO COURT ORDER." (App.163a).

Thus, the Diocese would have the right to reiterate its privilege objections to any *public* disclosures *before* any public disclosure could take place, even at the instance of the parties to whom the materials had been ordered produced. Two other judges in the

companion cases adopted Judge Levin's protective orders. (A410-20; A687; A844).[2]

There is no question that the Diocese *actually* believed that, by raising its First Amendment privileges in pursuing the protective orders and by complying with their terms, (i) the Diocese was preserving its constitutional privileges during the ensuing discovery process and (ii) no document subject to the asserted privileges would be released absent further court review, during which the Diocese could reassert its privilege claims.

Moreover, the Diocese understood that after issuance of the protective orders, it was obligated to produce discoverable materials under penalty of contempt. Accordingly, the Diocese did not continually repeat its constitutional privileges when it disclosed sensitive internal documents and provided the testimony of two Bishops in accordance with the terms of the protective orders.

Pursuant to the protective orders, various parties filed under seal 924 documents (many of them duplicates), totaling 12,675 pages. Most were appended to discovery-related motions, motions *in limine*, and motions for summary judgment that were later denied.

B. The Parties Settle The Underlying Cases.

After extensive settlement negotiations conducted by a federal magistrate judge acting as an independent mediator, the plaintiffs withdrew all twenty-three cases in March 2001, before any trial

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[2] "A__" refers to the Diocese's Appendix filed with the court below.

(A931, A935). According to unrebutted evidence, the Diocese's expectation that the sealed materials in the court's custody, including privileged discovery materials, would remain sealed was essential to the decision to settle on the terms to which the parties agreed (A931; A938).

C. A Year Later, Respondent *Hartford Courant* Violates The Protective Orders.

In March 2002, more than a year after the settlement, Respondent *Hartford Courant* somehow inveigled access to the sealed documents, which had remained in the court's custody. The *Courant* published a lurid article (A995-1007), detailing the contents of "thousands of documents in lawsuits that [the Diocese] fought, successfully, to keep sealed from public view" (A995). Acknowledging that the documents "remain sealed," the newspaper declared that that it "had obtained copies of much of them," including transcripts of pretrial testimony, internal Diocesan memoranda and "personnel files."

The Diocese promptly but unsuccessfully sought to retrieve its documents from the court's custody (A1110-1237).

D. The Newspapers Seek to Unseal And Publish The Confidential Documents.

A week later, having failed to act for more than a year since the settlement and nearly eight years since the entry of the first of nearly two dozen widely-publicized protective orders, Respondent *New York Times* filed an "emergency" motion to intervene in the settled cases, a motion later joined by three other newspaper companies, Respondents *Hartford Courant*, *Washington Post*, and *Boston Globe*. The *Times* invoked the presumptive "rights of public ac-

cess" found in "the First Amendment of the United States Constitution," as well as the Connecticut Rules of Court and the common law.[3]

E. The Connecticut Courts Vacate the Protective and Sealing Orders.

A new judge (Alander, J.) granted the Newspapers' motion to vacate the sealing orders and ordered public disclosure of virtually all of the Diocese's internal documents (App.137a-138a). He recognized that federal and state courts are in conflict about how to identify those "judicial documents" to which the public's presumptive right of access attaches. He opted for a broad rule (App.110a-117a).

He concluded that the Diocese had "waived" its First Amendment privileges by participating in pretrial discovery in accordance with the protective orders without lodging further objections when it actually produced the required materials (App.125a-129a). He also rejected the Diocese's alternative request to recognize the doctrine of "selective waiver," under which disclosure of confidential information on a selective basis to a limited category of recipients does not necessarily require the protected party to disclose the information to the world at large (App.130a).

A divided Supreme Court of Connecticut affirmed (App.4a-5a). In defining "judicial documents," the court identified a three-way split among federal and state appellate courts. The court acknowledged that

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[3] The Newspapers' intervention motion initially went up to the Supreme Court of Connecticut on a jurisdictional question. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168 (2005) ("*Rosado I*") (excerpted at App.164a-177a).

the purpose of this "presumption," which has its own First Amendment dimension, is to enable the public to monitor how *the courts* are performing their adjudicative functions. The court adopted the broad view that the presumption applies to any document filed with a court on which the court reasonably *could* rely in support of *any* adjudicatory function.

The majority also upheld the trial court's conclusions (i) that the Diocese had waived its federal constitutional privileges by not standing on its claims of First Amendment privilege when disclosing documents and testimony pursuant to the protective orders, and (ii) that "selective waiver" was not available to preserve any portion of the Diocese's constitutional privilege.[4]

Neither Judge Alander nor the appellate court denied that the First Amendment privileges that the Diocese had allegedly "waived" are valid or otherwise

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[4] These claims were raised and preserved throughout the proceedings. For example, the Diocese's briefs before the Connecticut Supreme Court argued the privilege issues over the course of several pages, including a section entitled "The Constitutional Privileges." (App.189a-190a). See also App.186a-190a (Defendants Br. May 15, 2007), explaining why the "compelled disclosure of such confidential, privileged communications and deliberations would violate the Religion Clauses of the Federal Constitution …".

Before Judge Alander, the Diocese's counsel explained that "no production was voluntary" (App.292a), and Judge Alander considered sufficient the Diocese's discussion of its privileges: "I think it's been well covered in your memorandum, the specific privileges that you're claiming and the basis for them." (App.197a).

Moreover, the Diocese provided the court with a comprehensive privilege log identifying *each* privilege claimed for *each* document.

applicable. See App.62a-63a n.36 ("Because we conclude that the trial court properly determined that the defendants waived all privileges . . ., we express no opinion as to whether the first amendment affords any such religious privileges.").

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Connecticut presents two issues of substantial importance.

I. The Connecticut Court's Waiver Standard Conflicts With This Court's Waiver Jurisprudence.

A. The First Amendment Prohibits Civil Authority From Intruding Into Internal Church Governance, Including Ministerial Assignments.

The First Amendment privileges that the Diocese raised and reiterated throughout the litigation, but was later deemed to have waived, are genuine. They rest on the principle that a church may not be compelled to disclose internal documents relating to hierarchical determinations regarding fitness for ministry.

The Religion Clauses of the First Amendment govern both legislative and judicial action. See *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 8 (2004). Circumscribing the power of federal and state courts, this Court has established the "internal affairs" doctrine, which prohibits civil courts from reviewing church decisions about their own clerical matters:

> "[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious

> organization of hierarchical policy on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976).

See also *Larkin* v. *Grendel's Den*, *Inc.*, 459 U.S. 116, 122 (1982) (one purpose of First Amendment was "to foreclose state interference with the practice of religious faiths"); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971) (First Amendment forbids excessive governmental entanglement with religion).

Lower courts have recognized this established constitutional autonomy. See, e.g., *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) ("Free Exercise Clause protects *** religious institution's right to decide matters of faith, doctrine, and church governance" (citing *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

This constitutional autonomy applies not merely to matters of abstract theological doctrine and church structure but also to a church's determination of fitness for ministry. This corollary of the "internal affairs" doctrine is the "ministerial exception," which places outside the jurisdiction of federal and state courts any effort to reexamine a church's selection of its leadership or its ministers, or its evaluation of their fitness for ministry. See *Serbian Orthodox Diocese*, 426 U.S. at 717 ("questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern"). Thus,

> "it is the function of the church authorities to determine what the essential qualifications of a chaplain are *and whether the candidate possesses them*." *Gonzalez* v. *Roman Catholic*

Archbishop of Manila, 280 U.S. 1, 16 (1929) (emphasis added);

For at least a century, it has been settled that, under the Religion Clauses, courts are forbidden to "'interfere [] with ecclesiastical hierarchies, church administration, *and appointment of clergy*.'" *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (emphasis added) (quoting *Minker* v. *Baltimore Annual Conf. of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990)) (surveying roots of "ministerial exception"). See, e.g., *Rayburn* v. G*eneral Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) ("right to choose ministers without government restriction underlies the well being of religious communit[ies]."); *McClure* v. *Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972) ("relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.").

The underlying lawsuits here sought to hold the Bishops and the Diocese liable in tort for ministry-assignment decisions that occurred after psychiatric evaluation, confession, and assertions of reform and rehabilitation. Catholic doctrine enshrines forgiveness, redemption and rehabilitation; sinners are deemed to be recoverable rather than permanently damned. That tri-fold belief in remorse, redemption, and rehabilitation is necessarily an ingredient in the Diocese's decision making whether to restore someone to ministry who has been accused of improper conduct or even found to have engaged in such misconduct. Such ministry-assignment decisions are

fundamentally religious in nature and, as such, are constitutionally protected:

> "[T]he church as an institution must retain the corollary right to select its voice. A minister is not merely an employee of the church; she is the embodiment of its message … Accordingly, the process of selecting a minister is per se a religious exercise. … Consequently, any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs." *Petruska*, 462 F.3d at 306-07.

As one court explained in barring claims of negligent hiring, training and supervision filed against an Archdiocese in a case alleging a priest's sexual misconduct against a minor, the First Amendment

> "prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff* v. *Archdiocese of Milwaukee*, 194 Wis. 2d 302, 326 (1995).

Civil juries and civil courts are not to be allowed, in retrospect, to conclude that the Diocese's weighing of these factors resulted in a misguided or negligent decision about how to handle the allegations against the individual minister, even if allegations are confirmed. As the D.C Circuit recognized in *Minker*: "We also agree that any inquiry into the church's reasons for asserting Minker was not suited for a

particular pastorship would constitute an excessive entanglement in its affairs." 894 F.2d at 1360.[5]

Admittedly, the lower courts have split on the scope of these principles. See, *e.g.*, *Malicki* v. *Doe*, 814 So. 2d 347, 353-65 (Fla. 2002) (discussing split in authority); *Roman Catholic Diocese of Jackson* v. *Morrison*, 905 So. 2d 1214, 1224-37 (Miss. 2005) (same); *Swanson* v. *Roman Catholic Bishop of Portland,* 692 A.2d 441, 446-47 (Me. 1997) (Lipez, J., dissenting) (this is "an area of the law in which the U.S. Supreme Court cases offer limited guidance and there remains significant doctrinal uncertainty"); *Morrison*, 905 So. 2d at 1248-56 (Smith, C.J., *dissenting*) (collecting cases).

One of the trial judges here rejected the Diocese's argument that the First Amendment bars a claim against a church for negligent supervision or retention, but recognized a split in authority on this question. See *Rosado* v. *Bridgeport Diocesan Corp.*, 716 A.2d 967, 969-71 (Conn. Super. 1998). If the Diocese had not settled the cases, relying upon the continued protections provided by the protective orders, it would have retained the right to appeal that erroneous decision. Indeed, the Connecticut Supreme Court left open the question whether the First Amendment bars claims against a church alleging negligent hiring, retention and supervision of its ministers (App.62a-63a n.36).

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[5] A church's First Amendment right to make these decisions without civil court supervision does not protect individual clergymen from being held personally accountable for their *own* misconduct in violation of facially neutral legislative norms. See *Employment Div., Dept. of Human Res. of Oregon* v. *Smith*, 494 U.S. 872, 885 (1990).

Any lingering uncertainty about the answer to that question frames the issues now before this Court.

B. The First Amendment Also Creates a Corollary Privilege Against Civil Discovery And Forced Public Disclosure Of Internal Church Documents Concerning Ecclesiastical Policy Decisions.

Because courts lack a legitimate role under the First Amendment to examine a church's employment decisions regarding its ministers, the courts similarly lack constitutional authority to require a church to produce and publicly disclose confidential internal documents or testimony that would be germane only to second guessing those decision decisions. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); see *Hiles* v. *Episcopal Diocese of Massachusetts*, 773 N.E.2d 929, 936-37 (Mass. 2002) (protecting under First Amendment internal church records, reflecting parishioner's accusation against priest in church disciplinary process, from being "tested in a civil court").

Various federal and state appellate courts have applied this constitutional autonomy to bar discovery that would involve what the D.C. Circuit called "excessive entanglement" in the internal affairs of a church, such as "any inquiry into the Church's reasons" for determining that a clergyman was or was not suitable for a particular assignment. *Minker*, 894 F.2d at 1360; see, e.g., *Rayburn*, 772 F.2d at 1170 ("Church personnel and records would inevita-

bly [but impermissibly] become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers"); *Doe* v. *Corp. of President of Church of Jesus Christ of Latter Day Saints*, 90 P.3d 1174, rev. denied, 110 P.3d 213 (Wash. 2005); *McKelvey* v. *Pierce*, 800 A.2d 840 (N.J. 2002).

Accordingly, the First Amendment circumscribes discovery that intrudes too deeply into matters of ecclesiastical autonomy. That was the privilege that the Diocese repeatedly raised here to protect the confidentiality of its internal records of clerical evaluation. The protective orders assured that no materials of this kind could be used at trial or publicly disclosed unless and until the trial judge ruled on the privilege as to specific documents "before being released from the protection afforded by this order" (App.163a).

C. The Standard That The Connecticut Supreme Court Established For Waiver Of Federal Privileges Conflicts With The Controlling Constitutional Standard.

In ordering the confidential materials disclosed to the public, neither Judge Alander nor the Connecticut Supreme Court denied the validity of the First Amendment privilege to protect confidential, internal church records from compelled public disclosure. Instead, the courts relied on a far too sweeping concept of "waiver."

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). This Court demands a height-

ened standard before finding waiver of federal constitutional rights, even in civil cases: there must be "an *intentional* relinquishment or *abandonment* of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). "Courts should 'indulge in every reasonable presumption against waiver.'" *Barker* v. *Wingo*, 407 U.S. 514, 525 (1972); see, e.g., *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 682 (1999).

The Connecticut Supreme Court's waiver standard upends these constitutional tests by conflating the *Zerbst* standard with the lower waiver standards associated with mere evidentiary privileges. The holding promises broad-reaching consequences for the administration of justice in both federal and state courts.

Here, the Diocese asserted and preserved its First Amendment privileges. The Diocese timely objected to discovery requests, timely raised the relevant constitutional objections in its motions for protective orders, and successfully persuaded the trial judges to provide the shelter of protective and sealing orders in response to specific deposition notices and document production requests. The orders provided that no confidential documents could be released publicly, absent additional judicial review during which the Diocese could reiterate its claim of privilege. The Diocese's participation in discovery occurred within this protective architecture.

Years later, a different Superior Court judge suggested that, after obtaining the protective orders, the Diocese was not acting "under the compulsion of a court order," when it produced the materials and thus it "waived" its constitutional privileges by failing to raise its constitutional privilege objections

again at the time of production, and the court below agreed (App.127a; App.61a-64a).

The conclusion that these circumstances show that the Diocese "voluntarily" produced privileged documents and testimony "without objection" cannot be squared with the controlling federal standard. See 26A Charles Wright, FEDERAL PRACTICE AND PROCEDURE § 5026 (1992) ("The holder does not 'voluntarily' disclose privileged matter when she does so pursuant to judicial compulsion. … [D]isclosure is 'voluntary' [only] if the privilege is not asserted").

The federal standard for finding waiver cannot be so lax that it requires a litigant to continue to refuse to comply with the discovery request, even after the litigant successfully seeks a court's protection and, after invoking the constitutional privilege, obtains protective orders sealing the materials against any further dissemination to third parties. Compare *United States* v. *Kordel*, 397 U.S. 1, 7-10 (1970) (corporate officer waived privilege against self incrimination when answering government interrogatories after he failed to invoke Fifth Amendment privilege "*at any time*"). See *Nat'l Polymer Prods., Inc.,* v. *Borg-Warner Corp*., 641 F.2d 318, 423-24 (6th Cir. 1981) ("clear and compelling" standard for relinquishment of First Amendment rights not met by compliance with pretrial protective order).

The court below failed to appreciate that the constitutional dimension of the First Amendment's "internal affairs" privilege and "ministerial exception" requires a different standard than that applied to mere evidentiary privileges. Indeed, other than an initial reference to *Zerbst*, every one of the cases on which the court relied in upholding the waiver determination involved non-constitutional privileges or

defenses, which are subject to lower waiver tests. (App.64a-66a).

The court below also misapprehended the controlling federal standard when it suggested that the Diocese had abandoned its claim of constitutional privilege, because Judge Levin's original ruling on the Diocese's motion for protective order was "ambiguous" and the Diocese had not sought a ruling "clarify[ing] the basis of the trial court's ruling" (App.66a, n.38). In the context of constitutional privileges, the operative presumption in the face of any ambiguity is *against* waiver. *Emspak* v. *United States*, 349 U.S. 190, 195-97 (1955); *D.G. Acquisition Corp*. v. *Dabah*, 151 F.3d 75, 81 (2d Cir. 1998); Paul Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 10:1 (2d ed. 2007) (observing that, if attorney-client privilege should "ever be recognized as a *constitutional* right, the standard for waiver would change dramatically" (citing *Zerbst*) (emphasis added)).

Producing the confidential material under the terms of the protective orders could not satisfy this Court's "deliberate" waiver standard. Under the protective orders, the Diocese was entitled to preserve the confidential status of documents, even at or beyond trial, by marking the documents "CONFIDENTIAL: SUBJECT TO COURT ORDER." Then, if a plaintiff wanted to use the document publicly, the plaintiff would have had to submit the document to "the court for review and appropriate order *before being released from the protection afforded by this order*" (App.32a-33a) (emphasis added). As even Judge Alander later acknowledged, "some affirmative step needed to be taken by Judge Levin before the protec-

tive order ended or before any documents were released from its protection." (App.107a-108a).

If the act of producing the documents to the plaintiffs under the protective orders had constituted an absolute "waiver" of the privileges, there would have been no reason to require court review before the sealed documents could be used at trial and made public. Because the orders necessarily assumed that the Diocese would not be waiving its privileges *even as against the plaintiffs*, who actually would receive the documents (subject to stringent limitations), the Diocese could not have "intentionally abandoned" the privileges as against strangers to the litigation when it complied with the protective orders.

Under the Connecticut court's decision, however, adherence to the process that the three trial judges had crafted amounted to an intentional abandonment of the privileges. The court ruled that, to preserve the Diocese's federal constitutional privileges even after it secured a protective order, the Diocese had to refuse to produce the information pursuant the orders and to go into contempt (App.67a-68a). That notion is fundamentally at odds with this Court's standard for finding a waiver of federal constitutional rights. See *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967) ("we are unwilling to find waiver in circumstances which fall short of being clear and compelling."); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) ("When First Amendment rights are at issue, the evidence must be clear and compelling that such rights were waived.").

It is important to the administration of justice for the Court to determine that a litigant – particularly

a church – producing privileged material under a protective order does not forfeit a constitutional privilege *by declining to go into contempt.*

D. The Subsidiary "Selective Waiver" Question Is Also Of Substantial Importance.

An important, related question is whether "selective waiver" is a valid mechanism for protecting constitutional privileges against unnecessarily broad waivers. If the Diocese in some sense "waived" its right to the *absolute* confidentiality of its internal deliberations by disclosing them to several lawyers and adverse claimants under stringent judicial protections, forbidding any further dissemination to third parties, was it "intentionally" abandoning its right to shield this confidential information from the world at large? There is no rational basis for that conclusion, and nothing in this Court's waiver jurisprudence justifies it.

The "selective waiver" principle recognized by some courts avoids the overbreadth of this kind of inference of waiver. See, *e.g.*, *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997) (applying "selective waiver" rule in civil litigation following earlier disclosure of privileged material to another adversary, sustaining privilege); *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (same); see *also XYZ Corp.* v. *United States*, 348 F.3d 16, 28-29 (1st Cir. 2003). Other courts, however, refuse to recognize this doctrine, although for conflicting reasons. See, e.g., *In re Qwest Commc'ns. Int'l, Inc.*, 450 F.3d 1179, 1186-1201 (10th Cir. 2006); *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

As another circuit has recognized, selective-waiver case law is beset by "hopeless confusion." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002). See also Gretchen Eoff, *Losing the War on Attorney-Client Privilege: Viewing the Selective Waiver Quagmire Through the Tenth Circuit's In Re Qwest Communications International*, 75 DEFENSE COUNSEL JOURNAL 79, 89 (2008) ("The federal circuits are split regarding the adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material."); Adam Aldrich, *In re Qwest Communications International: Does Selective Waiver Exist for Materials Disclosed During A Government Investigation?* 84 DENVER UNIV. L. REV. 809 (2006) (discussing troubling "lack of uniformity in reasoning among the circuits" regarding selective waiver).

The court below aligned itself with the courts that refuse to recognize this sensible way to avoid the dilemma of forcing a choice between complete obduracy and unlimited waiver of an otherwise valid privilege (App.68a) (citing D.C. Circuit in *Permian*, 665 F.2d at 1220-21, rejecting selective waiver, because party had made affirmative disclosure of privileged material to achieve tactical advantage in earlier proceeding).

Here, the Diocese asserted its constitutional privileges against all who sought to pry into its evaluations of fitness for ministry. It did not volunteer to produce this material selectively to some plaintiffs while withholding it from others. It was hardly in the Diocese's tactical interests to comply with these discovery demands, and it resisted doing so. Instead, the Diocese merely complied with court

orders that treated all plaintiffs equally, both in allowing pre-trial examination *and forbidding any further dissemination*. There is no basis to conclude that this limited and secure disclosure automatically – and "intentionally" – forfeited the right to keep the Diocese's private records off the front pages of the tabloids.

Therefore, even if the Diocese's compliance waived its right to *absolute* confidentiality, by providing restricted access to a small number of persons to whom the documents were disclosed under seal, this Court should consider whether federal and state courts must preserve as much of a constitutional privilege as possible by recognizing and applying the "selective waiver" doctrine.

II. The Courts Are Split on the Definition of "Judicial Documents" Subject To The "Presumption of Public Access."

This Court should grant certiorari to resolve the acknowledged conflict over the appropriate definition of the "judicial document" concept to which the limited presumption of public access applies.

A. The Federal Common-Law Presumption of Public Access Focuses On Monitoring Judicial Performance, Not Private Litigants' Affairs.

In *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), this Court recognized a federal right "to inspect and copy public records and documents." See *San Jose Mercury News, Inc.* v. *U.S. Dist. Court Northern Dist. (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999). The common law presumption of public access to court proceedings predates the adoption of the Federal Constitution and derives

from the centuries old practice of open trials. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564 73 (1980) (plurality). This Court has extended the presumption to various court documents in the criminal context, see, *e.g.*, *Press Enterprise Co.* v. *Super. Ct. of California*, 464 U.S. 501 (1984) ("*Press Enterprise I*"). Federal and state appellate courts have extended the presumption to assorted court documents in the civil context. E.g., *San Jose Mercury News*, 187 F.3d at 1102.

As the court below acknowledged, the presumption's central concern is to permit the public to assess whether *the judicial process* is functioning properly. (App.37a). The purpose of the presumptive access is to enable the public to have enough access to judicial proceedings to evaluate how *the courts* are performing their important adjudicative role. See *Chicago Tribune Co.* v. *Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001).

The presumption never has been intended as a constitutional or common law right to gather information for the purpose of investigative journalism probing the activities of private litigants. Indeed, this Court has held that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965). Nor does the First Amendment guarantee the press unique access to information beyond what is available to the public at large. *Houchins* v. *KQED*, 438 U.S. 1, 14-16 (1978).

In particular, the presumptive right of access was never understood as a vehicle for salacious inquiry into individual litigants' private matters.

> " [T]he right of access is grounded primarily in the need for scrutiny of the legal process, not simply in the public's desire to learn more about the deeds and misdeeds of the parties." *Mokhiber* v. *Davis*, 537 A.2d 1100, 1110 (D.C. 1988).

Moreover, the presumption is not absolute. Countervailing considerations may outweigh the public's interest even in monitoring judicial proceedings. See *Nixon*, 435 U.S. at 598 (right to inspect court records may give way when "court files might have become a vehicle for improper purposes" such as "to promote public scandal"); *San Jose Mercury News*, 187 F.3d at 1102. See also *United States* v. *Amodeo*, 71 F.3d 1044, 1048-49 (2d Cir. 1995) ("*Amodeo II*").

B. The Courts Are In Conflict Over The Scope Of "Judicial Documents."

The presumption of public access depends on the threshold question whether the documents are "judicial documents." See *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006). This case frames the questions that have divided federal and state appellate courts: What is the scope of this concept of "judicial documents," and how is the presumption of public access to be applied?

This Court has not squarely addressed the scope of "judicial documents" to which the presumption attaches in a civil dispute between private litigants. Compare *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33 (1984) (noting "pretrial depositions and interrogatories are not public components of a civil trial," as such proceedings "were not open to the public at common law").

As the court below recognized, courts have divided on how to define judicial documents for this purpose, describing a three way split in authorities (App.41a-48a,). See "*Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1928-2006*," 78 U. Colo. L. Rev. 817, 863 (2007) (analyzing how "judicial documents" is "a term subject to varying definitions across the federal courts").

Some have limited the documents to "materials on which a court [actually] relies in determining the litigant's substantive rights," *Anderson* v. *Cryovak, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (citing *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1340 (D.C.Cir. 1985); accord, *Federal Trade Comm'n* v. *Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408-09 (1st Cir. 1987).

Other courts, including the court below, view as "judicial documents" all documents "that *reasonably may be relied upon* in support of *any part* of the court's adjudicatory function" (App.42a) (emphasis added). For example, this approach accords "judicial record" status to materials attached to discovery-related pretrial motions, or even requests for procedural orders (App.51a) ("among the courts following the majority rule, there is [also] a split as to whether discovery related motions and their associated exhibits should be considered judicial documents"). Compare *Mokhiber*, 537 A.2d at 1111 (holding presumptive right of public access applies to discovery motions and attached materials), with *Chicago Tribune*, 263 F.3d at 1312 (rejecting presumptive right of access to material filed with discovery motions, but holding "discovery material filed in connection with pretrial motions that require judicial resolution of

the merits" is subject to presumptive right of access), and *Reporter's Committee*, 773 F.2d at 1338 (Scalia, J.) ("We are certainly unaware of any tradition of public access (pre or post judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre trial motions.").

The court below also identified a third approach that attaches the public right of access to *every* document *filed* with a court. See, e.g., *Leucadia, Inc.* v. *Applied Extrusion Techs., Inc.,* 998 F.2d 157, 161-62 (3d Cir. 1993).

Here, the Connecticut Supreme Court deemed to be "judicial records" a vast volume of documents filed under seal pre-trial, some filed in connection with motions *in limine*, others with discovery-related motions, and others in connection with the motions for summary judgment that were denied.

This Court should grant certiorari to resolve the question whether the presumptive right of access under the common law and First Amendment extends to all documents submitted to a court in connection with any request for any judicial ruling, regardless of how resolved, and regardless of whether access to the documents has any bearing on the public's ability to evaluate judicial performance.

C. This Court Has Jurisdiction To Review The "Judicial Documents" Question.

In opposing a stay, Respondents asserted that this Court lacks jurisdiction to review the "judicial documents" issue. The Court, however, has multiple bases of jurisdiction under 28 U.S.C. § 1257 to review the Connecticut court's definition and application of the "judicial documents" doctrine. For example, this Court possesses § 1257 jurisdiction when a "state

court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984); see *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996); *Zacchini* v. *Scripps Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); Eugene Gressman et al., SUPREME COURT PRACTICE, § 3.23 (9th ed. 2007). Several aspects of the Connecticut Supreme Court's analysis are inextricably intertwined with federal law – both First Amendment principles and federal common law.

First, it appears that this Court has concluded that, if the common law historically required certain proceedings to be open to public examination, the First Amendment codified and preserved that traditional requirement. Thus, a determination by a state court about what the "common law" requires necessarily implicates the First Amendment, at least where, as here, the state court relied on its understanding of traditional common law requirements rather than some state-specific *enlargement* of the common law.

The First Amendment was "enacted against the backdrop of the long history of trials being presumptively open." *Richmond Newspapers*, 448 U.S. at 575. This Court derived a qualified constitutional right of access to certain public proceedings from the First Amendment itself, a right that broadly overlaps with the common law presumption. *Press Enterprise Co.* v. *Super. Ct. of California*, 478 U.S. 1 (1986) ("*Press Enterprise II*").

As a result, the First Amendment substantially codified and guaranteed whatever the traditional common law originally required as a matter of presumptive public access. See *Globe Newspaper Co.* v.

Super. Ct. for the City of Norfolk, 457 U.S. 596, 604 (1982). See also *Reporters Committee*, 773 F.2d at 1339) (Scalia, J.) ("To the extent a First Amendment right to post judgment civil records exists, it does not exceed … the traditional common law right.").

When determining whether the First Amendment extends to new kinds of proceedings or procedures that were unknown at common law, the Court reasons by analogy to determine whether the common-law rationale underlying public access to the courts' activities requires opening the new proceedings. *Press Enterprise II*, 478 U.S. at 8. See *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, __ F.3d __, 2009 WL 2526486, **6-8 (2d Cir. Aug. 20, 2009); *Reporters Committee*, 773 F.2d at 1332-38 (Scalia, J.) (surveying historic practices regarding pre-judgment access and concluding that the First Amendment does not compel public access to pretrial or prejudgment matters). See also *Chicago Tribune*, 263 F.3d at 1310 ("Materials merely gathered as the result of the civil discovery process … do not fall within the scope of the constitutional right of access's compelling interest standard.").

At bottom, it appears that a court's determination that the common law required some particular form or scope of access means that the First Amendment also guarantees such access. See *Lugosch*, 435 F.3d at 120. Compare *Reporters Committee*, 773 F.2d at 1336 (opinions of Scalia, J., and Wright, J., disagreeing over scope of common law right of access in civil cases).

The court below acknowledged the overlap between the common law and the First Amendment:

> "The public has a common law presumptive right of access to [judicial] documents … *and likely a constitutional one as well*." (App.46a-47a) (emphasis added).

The court linked this common-law right-of-access to values "protected by the free-speech and free-press clauses of the First Amendment." (App.167a).

Indeed, the Respondent Newspapers themselves relied on the overlap between the common law and the First Amendment, arguing below:

> "[T]he public has a presumptive right of access to court proceedings and documents, *a right that traces its roots to the first amendment*." Intervenors-Appellees Br. at 20 (July 23, 2007) (emphasis added).

When they sought to intervene to unseal the confidential material, their Motion invoked "the Connecticut Rules of Court, the common law, and the First Amendment of the United States Constitution." (¶ 2).

This acknowledged overlap between the common law and the First Amendment provides a source of jurisdiction to review what a state supreme court decides was required by the common law.

The Court also has jurisdiction because, in attempting to ascertain the scope of the "common law" presumption of public access, the court below relied almost entirely upon federal cases construing the First Amendment or federal common law. See *Robinette*, 519 U.S. at 37 (sustaining jurisdiction over state decision purportedly construing the Ohio constitution, where state court cited almost exclusively to federal cases).

Although the court asserted that its construction of its Practice Book was "not bound by a test that a federal court must apply" (App.59a), the court's construction of the rule rested on federal jurisprudence. The court held that Connecticut Practice Book § 11-20A "codifies the common law presumption of public access to judicial documents" (App.50a). The drafters of that rule, however, invoked this Court's decision in *Nixon* v. *Warner Communications, Inc.* and the First Amendment analysis in the Third Circuit's opinion in *Publicker* v. *Cohen*, 733 F.2d 1059, 1070 71 (3d Cir. 1984), to support the proposition that the "public and press enjoy a right of access to attend trials in civil as well as criminal cases." App.205a (Conn. Prac. Book. § 11-20A Commentary (2003)). The Commentary collects federal authorities construing the common law and the First Amendment as the basis for construing the procedural rule. See App.205a-208a (Conn. Prac. Book. § 42-49A Commentary (2003) (cited in Commentary to § 11-20A) (right of access "is well settled in the common law and *has been held to be implicit in the first amendment rights* of protecting the freedom of speech, of the press, ***") (emphasis added) (citing this Court's decisions in *Globe Newspapers*, *Richmond Newspapers*, and *Press Enterprise II*))).

Thus, the rule on which the court below relied was expressly framed to mirror the requirements of the First Amendment and federal common law in light of federal precedents. Accordingly, this Court has jurisdiction to determine whether the Connecticut Supreme Court misapprehended the scope of federal constitutional and common law principles. It should exercise that jurisdiction to settle the confusion in the courts about the correct reach of the "judicial documents" doctrine in civil cases.

III. The Issues Are Important.

As the cases cited above demonstrate, both sets of issues are recurring and important. The privilege issues affect a wide variety of religious denominations, because many types of claims affect a church's internal personnel decisions. The approach of the court below forces churches (and other litigants) to challenge discovery orders that otherwise seem to protect their privacy interests rather than to participate in a circumscribed discovery process that – like the one here – may lead the parties to resolve their underlying dispute without resort to a trial. Every church should know what it must do to secure constitutional protection for its confidential internal files, particularly whether it must go into contempt rather than accept the accommodation of some form of protective order.

The "judicial documents" issue affects not only churches but all litigants seeking to preserve confidential discovery material following a settlement. As the dissenting Justice observed, the Diocese settled the cases before reaching trial, relying on the permanence of the confidentiality protections. As a result of the decision below:

> "parties to future cases will be subject to the risk of such publicity regardless of whether they settle a case and, therefore, they will have a reduced incentive to settle." App.96a-97a (Sullivan, J., dissenting).

In sum, this Court should resolve the confusion about the operation of the presumption against constitutional waiver in civil discovery, the scope of any such waiver, and the scope of the filings with a court

to which the public has a presumptive right of access.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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